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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1230

CITIES SERVICE COMPANY
CITIES SERVICE OIL COMPANY,
Petitioners,

v.

FEDERAL ENERGY ADMINISTRATION
FRANK G. ZARB, ADMINISTRATOR,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

REPLY BRIEF FOR PETITIONERS

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This reply is submitted (I) to point up the failure of the government to come to grips with the constitutional and statutory issues raised, and (II) to draw the Court's attention to recent amendments by respondents to the Cost Equalization Program (CEP) which demonstrate that the CEP constitutes an administrative subsidy program.

I

Respondents assert that the two-tier system of crude oil pricing, established by them "to minimize the inflationary impact of rising world oil prices," fortuitously confers a benefit on petitioners and therefore, it is argued, the benefit may be withdrawn by forcing petitioners to transfer cash funds directly to other refiners. Brief in Opposition, pp. 5, 15. The government-created benefit is described as fixing the sale price of "old" oil substantially below the market level. Brief in Opposition, p. 15. The government fails to mention that petitioners own substantial production of crude oil which is denominated "old" oil.[1] The "benefit" thus bestowed on petitioners is that they are not permitted to sell or transfer such crude oil at the higher price permitted in sales of "new" oil. While petitioners do not here challenge the two-tier pricing regulation, petitioners do indeed challenge the government's bland assertion that the scheme bestows a benefit on an integrated company such as petitioners. The government views petitioner only as a refiner and refuses to consider it as a producer.

The government fails also to meet the critical issue of forced purchase. The government asserts that it could have mandated petitioners to sell "old" oil at the lower price to other refiners who would in turn sell their higher priced oil to petitioners. According to the government, section 4(a) of the Emergency Petroleum Allocation Act would have permitted "the physical allocation of old oil and new oil among domestic refiners at regulated prices." Brief in Opposition, pp. 15-16. Since physical transfer would have been disruptive and costly, Respondents chose instead to require the transfer of entitlements instead of the oil it represents. The difficulty with the foregoing is that the government's premise is only half true. Assuming that respondents could mandate purchase opportunities of old or new crude oil at regulated prices, no authority exists to compel anyone to purchase. Completely ignored by the government are respondents' administrative decisions which have consistently held that any purchaser may decline to purchase an allocated product from any supplier. *See State of New Hampshire,* 2 FEA ¶ 80,574 (April 16, 1975) CCH Fed. Energy Guidelines; *Jacksonville Electric Authority,* 2 FEA ¶ 80,553 (March 21, 1975); *Swann Oil, Inc.,* 2 FEA ¶ 80,505 (January 9, 1975); *Better Home Heat Council, Inc.,* as modified, CCH Fed. Energy Guidelines, Par. 20,131 (July 24, 1974).

The government's treatment of the Fifth Amendment "taking" issue also glosses over the essential question, *viz.,* whether the government may take property from one person and bestow it directly upon another. Here the government attempts to muffle the operation of the CEP by characterizing its requirement for direct cash transfer as "limiting the profitability of petitioners' sales of old oil" and as the withdrawal of a "mere expectancy." Brief in Opposition, pp. 21, 20. While price regulation during periods of emergency which restricts the most profitable use of property has been upheld, it is difficult to fathom how a forced transfer of cash funds directly to another refiner can be called a mere restriction on the most profitable use of the funds. Indeed, upon transfer the funds are no longer in possession and, if the program be

[1] The record below indicates that petitioners own substantial quantities of "old" oil not because of fortuity but because petitioners have historically concentrated their expenditures in the search for and development of domestic petroleum.

valid, there exists no claim over against the recipient. The Fifth Amendment contains twelve words which impose a restraint on the power of eminent domain. If that bedrock provision is so enfeebled as to impose no constraint on the CEP, the way is clear for the government to make wider use of the mechanism of forced cash payments to equalize what may be deemed to be conditions of inequality.

II

Petitioners contend also that the CEP, in violation of the Fifth Amendment and Article I, Section 8, Clause 1 which reserves to Congress the taxing power, constitutes the raising of revenue by an administrative agency in order to fund a subsidy to certain segments of the petroleum industry. Since filing of petition in this proceeding the CEP has been amended by respondents to promote the following interests.

By regulation issued March 29, 1976, respondents amended the CEP so as to permit firms importing residual fuel oil from foreign refiners into the East Coast to receive cash payments from persons such as petitioners. 41 Fed. Reg. 13899 et seq. (April 1, 1976). Respondents' stated purpose for this amendment is that "FEA has concluded that mitigation of the competitive imbalance which exists in the East Coast residual fuel oil market is definitely necessary." 41 Fed. Reg. at 13899.

By regulation issued May 12, 1976, respondents amended the CEP so as to provide additional entitlements to small refiners, the effect of which is to decrease the number of entitlements issued to petitioners and thereby increase their cash payments. 41 Fed. Reg. 20392 et seq. (May 18, 1976). Respondents' stated purpose for this small refiner bias amendment is that FEA has received numerous indications that many small refiners are "in need of additional bias amounts to remain competitive and financially viable. Many operating and other costs for these firms have increased since 1972 . . . ." 41 Fed. Reg. at 20392.

By notice of proposed rulemaking issued May 25, 1976, respondents propose to amend the CEP so as to permit firms importing naphtha into Puerto Rico to receive entitlements, as if the naphtha were crude oil, and thus receive cash payments from persons such as petitioners. 41 Fed. Reg. 21936 et seq. (May 28, 1976). Respondents' stated purpose for the proposed amendment is "to alleviate the unique competitive disadvantages for Puerto Rico based companies and to recognize the pre-existing United States policy encouraging the construction of petro-chemical facilities in Puerto Rico." 41 Fed. Reg. at 21937.

All of the foregoing may be worthy and laudable purposes but the question is whether petitioners may be required to fund these goals or whether the expense should be borne by the General Fund.

Respectfully submitted,

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